CODIFICATION OF THE DOCTRINE OF RESCISSION.

When I prepared the article on Rescission for Breach of Warranty, which appeared in the COLUMBIA LAW REVIEW, for January, it was my intention to follow it with a discussion of the relative merits of the two rules. Professor Williston's reply to my article, with its courteous invitation, or, perhaps, challenge, to such a discussion, induces me to enter upon it now.

I am frank to say that I thought, and still think, the proposition in his original article on rescission, which I dealt with in the January REVIEW, its most vulnerable part. But that was not my sole or chief reason for dealing with it first. If his assertion that "nearly as many courts have followed the Massachusetts rule as have followed the English law" is inaccurate; if, instead of eleven jurisdictions, only two have unequivocally adopted the Massachusetts rule, and but three or four more, at most, seem inclined to prefer that rule; while all of the Federal Courts, as well as those of nineteen State and Territorial jurisdictions, have unhesitatingly adopted the English rule, and several others have indicated, in *dicta*, their approval of that rule, a very powerful argument is afforded for incorporating it rather than the Massachusetts rule in an American Code of the Law of Sales. If my understanding of the cases cited by my learned friend is correct, it would be a hopeless task for Committees on Uniform State Legislation to attempt to force the Massachusetts rule into such a code. The undertaking would be as idle, and with all respect I say it, as ridiculous, as that of attempting to make the tail wag the dog.

Hence, a careful scrutiny of the cases cited by my learned friend seemed to me a necessary prelude to any discussion of the two rules upon their merits. As my analysis and estimate of those cases have been called in question by him, I beg leave briefly to review his explanation of them.

BRIEF REVIEW OF PROFESSOR WILLISTON'S REPLY.

Before addressing myself to the cases, however, I must refer to my learned friend's astonishing misconception of my understanding of the issue between us. I understood

it to be precisely what he states, in his reply, it should be; viz. "Whether rescission of an executed sale is allowable for breach of a promise, whether collateral, part of the description, or wholly implied." There is nothing, in my former article, I submit, which justifies my learned friend's suspicion that I was directing my remarks to any other or different issue. He has done me the honor of referring, in one of his notes to my text book on Sales. If he cares to look into that volume again, he will find this statement, relative to the buyer's right upon a breach of warranty:[1] "A breach of this collateral agreement by the seller does not entitle the buyer to return the goods; it gives him only a right to damages, save in a few jurisdictions. Such is the rule, whether this engagement is collateral from the first, or whether, being an essential term of the contract, and available as a condition precedent to the buyer, he has taken title to the goods, and waiving his right to treat the engagement as a condition, can take advantage of it only as a collateral agreement. In either case, the title to the goods, having vested in the buyer with the assent of both parties, cannot be divested by the sole act of either." There is nothing in my former article which is at all at variance with the foregoing statement; nothing which warrants the belief that I assumed a different "line of cleavage," to that defined in Professor Williston's reply.

I submit, therefore, that a large part of that reply, while interesting of course, is wholly irrelevant to my article. I must also disclaim all responsibility for the views and ratiocination ascribed to me in that part of his production. After putting me in a hole of his own preparing, he suggests "one logical way of escape."[2] I am frank to say that my ingenuity would not have been equal to devising even that one way; and I trust that my intellectual honesty and my common sense would have saved me from any attempt to discover or use it.

Following the Massachusetts Rule.

What is meant by the statement that a particular Court has followed the Massachusetts rule? Does it mean simply

[1] Burdick on Sales (2d Ed.), p. 140, ¶ 232.

[2] 4 Columbia Law Review, p. 202.

this, that a judge of that court in a reported opinion has uttered the dictum, that "the buyer is entitled to rescind a sale transaction for a breach of warranty"? My learned friend clearly indicates that he means by it something more than this. Referring to the decisions cited in his first article he says: "In so far as these decisions relate merely to contracts to sell, I admit that they are not in point." This admission, I submit, takes out of his list of decisions cited as following the Massachusetts rule, both of the California cases,[1] two of the Kansas cases,[2] and both of the cases from Nebraska.[3]

[1] Polhemus *v.* Herman (1873) 45 Cal. 573, Contract *to* sell and deliver wool. Hoult *v.* Baldwin (1885) 67 Cal. 610. My learned friend thinks I made two slips in stating this case. If he will carefully read the report again, I feel confident he will agree with me that the court treated the case and properly treated it as involving an executory contract to sell, not an executed sale. The court points out that the defendant refused to close a contract with plaintiff except upon the latter's guaranteeing "that the machine would do good work in cutting and threshing ordinary grain, standing from one to five feet high"; that the plaintiff at the same time promised to send a man to "start the machine and show to your (defendant's) satisfaction that it is all we have represented"; that upon the machine's breaking while being hauled from the depot to the ranch of defendant, the latter "*declined to accept* the machine." The case is squarely within the words of Lord Chelmsford, quoted by my learned friend (4 Col. L. R. 199) The purchaser had, under the conditions precedent attending the contract, a right to keep the machine a sufficient time to give it a fair trial, and if it did not conform to the conditions to reject it.

[2] Craver *v.* Hornburg (1881) 26 Kan. 94, Contract *to* sell. On p. 95 Brewer, J., treats the case as one involving an executory contract, precisely as an English court would have done, and his statement of the right of rescission does not differ materially from Lord Chelmsford's, referred to in the foregoing note. Weybrich *v.* Harris (1883) 31 Kan. 92. Express provision that sellers were to take the machine back if they failed to make it work as promised. On p. 94 Brewer, J., says: "A purchaser cannot retain and use property, and at the same time say he repudiates and rescinds the contract *to* purchase"; showing that the *dictum* he had thrown out in this case applied only to executory contracts, or to executed sales with an actual stipulation for rescission.

[3] Davis *v.* Hartlerode (1893) 37 Neb. 864 is admitted by Professor Williston to be a case of warranty on express condition, if the statement made by the buyer in his testimony was true. But there is not the slightest intimation in the opinion that it was disputed or questioned by the seller. True, my learned friend says "The other witnesses to the transaction, however, said nothing of the sort." I cannot forbear asking how he knows they did not? The court quotes from the buyer's testimony and from the testimony of one of his witnesses, and adds: "Four other witnesses testified to substantially the same facts." Where is the warrant for the dogmatic assertion that "the other witnesses * * * said nothing of the sort"? I cannot find it. And I submit that the candid reader will set this case down as one, in which the statement as to rescission for breach of warranty is limited to an executory contract, as the statement in McCormick Harvesting Machine Co. *v.* Knoll (1899) 57 Neb. 790, is clearly limited.

My learned friend admits that the Nebraska "cases would be entitled to little consideration," "if there were any more explicit authorities in Nebraska." How, I beg to ask him, does the absence of any more explicit authorities in that State entitle these to increased consideration? While I do not concur in his judgment that these are the weakest of the cases cited by him, I do think they are as weak as the weakest; as weak as those from California and Kansas and that all are barred out, by the admission in his second article, that decisions relating to contracts to sell are not in point.

Again, cases are not in point, I submit, which decline, in express terms, to recognize the right of rescission for the breach of any and every warranty. It is the very essence of the Massachusetts rule, that "if the seller has promised in any form that the goods possess some quality and they do not," the buyer may rescind the sale, although it is executed. This bars out the decisions of the Louisiana court,[1] and the third case from Kansas.[2]

Still again, cases are not in point, I submit, which contain only a *dictum*, especially if this is confined to headnotes or to hypothetical cases. This bars out the Arkansas cases, cited in Professor Williston's reply, as well as the Ohio case.[3] The last named case has been most ingeniously explained by my learned friend. He says:[4] "It is clear in this case that the title to the barrels passed by the original sale. The contract of rescission, accompanied as it

[1] I understand this to be virtually admitted, 4 Col. L. R. p. 209.

[2] At p. 209, 4 Col. L. R., it is said if the breach of warranty is not material, the question is still open in Kansas. Manufacturing Co. *v.* Stark (1891) 45 Kan. 606, belongs to the class of cases, of which Bannerman *v.* White (1861) 10 C. B. N. S. 844 is an excellent example in England; although the Kansas judge is not as happy in his choice of terms as is Erle, C. J. He uses the term warranty without appreciating the fact that the word has two senses; but his understanding of the intention of the parties, as I read the case, is the same as that of the English Chief Justice, that the contract should be null, if the facts were as they turned out to be.

[3] Byers *v.* Chapin (1876) 28 O. St. 300. The first two head notes state the ground of decision: "1. A contract made under mistake as to a material fact, may be rescinded by the party sought to be charged, upon discovery of the mistake, he being guilty of no want of diligence in not ascertaining what the real facts are. 2. There is no difference in principle between the rescission of a contract to perform, and the rescission of a contract which is itself the rescission of another and existing contract."

[4] 4 Col. Law Rev. p. 207.

was by delivery was equally a resale, and of this resale, the Court allowed rescission for breach of warranty." Were the distinguished judge, who wrote the opinion in that case, alive, I am sure this would be news to him. No such point is hinted at in the opinion. The decision was based on the ground that the contract for rescission of the original sale had been assented to by the seller, under a mistake of fact on his part. After having decided the case on that ground, the judge, writing the opinion, added some remarks about warranties, which no one can read, I fancy, without being reminded of Lord Coke's remarks that "the learning of warranties is one of the most curious and cunning learnings of the law." Curious and cunning, certainly, is the judge's use of the term in this connection. Sir William Anson, after remarking that it would be a work of some research to enumerate the various senses in which the word "warranty" is used, proceeds to give nearly a score of "the commoner uses of the term." The novel use of it by Judge Wright in the Ohio case ought to be added to Sir William's list of warranty curiosities, but I can not find in his opinion any justification for the view suggested by my learned friend, that the rescission was treated as a resale, attended by a "promise"[1] on the part of plaintiffs, for the breach of which, the resale was rescindable. I, therefore, remain of the opinion formerly expressed that there is nothing in the decision warranting its citation as one following the Massachusetts rule.

California and North Dakota Codes.

My reasons for thinking that the California and North Dakota cases are not to be classed with those which follow the Massachusetts rule have been stated. Even if this classification were doubtful, the codes of those States certainly commit them to the English rule. The section upon this topic was drafted by New York lawyers, as a part of a Civil Code for New York, and was intended to state the rule as it then stood and still stands in this State.[2] It was

[1] In 16 Harvard Law Review p. 466, Professor Williston reminds his readers that "a warranty is simply a promise." Assuming that the rescission of the first sale is to be looked at as a resale, what promise of plaintiffs attended it?

[2] See Hull *v.* Caldwell (1893) 3 S. D. 451, 453.

adopted by California, North Dakota and South Dakota without verbal change. Notwithstanding these facts my learned friend writes: "The force of this provision depends on the effect given it by the Supreme Courts of the States in question." He suggests that the section can be construed by the Courts as a statement of the Massachusetts rule; that is, the following language:

"The breach of a warranty entitles the buyer to rescind an agreement for a sale, *but not an executed sale*, unless the warranty was *intended by the parties* to operate as a condition."[1]

can be construed to mean:

"The breach of a warranty entitles the buyer to rescind either an agreement for a sale, or an executed sale."

Now, I appeal not simply to the candid reader, but to the prejudiced reader; to the reader born and bred to the idea that a Massachusetts rule of law is necessarily and always the best rule; confidently do I appeal to such a reader, if any such exists; is it possible that any court will ever attempt such an extraordinary feat of construction? Until it does, California and North Dakota as well as South Dakota must be counted against the Massachusetts rule.

The result of this review of my learned friend's criticism is, I submit, that only Iowa and Maine can be counted as unequivocally committed to the Massachusetts rule; and that but three other States show, at the present time, any decided inclination in favor of that rule. The Maryland cases, cited by my learned friend in his second article, indicate a readiness in the highest Court of that State to array itself on the majority side, and to adopt what it styles the modern view, whenever the opportunity is squarely presented.

AN AMERICAN CODE SHOULD ADOPT THE PREVAILING RULE.

Not simply because it is the prevailing rule; although, when the preponderance of judicial authority is as over-

[1] Calif. Civil Code § 1786. North Dakota Code § 3988. South Dakota Code § 1340. The italics are mine.

whelmingly in favor of a rule, as it is in this case, that fact is entitled to great weight; but, for one reason, because it has been embodied in the Code of England and in the Codes of four of our States.[1]

One of the primary objects of the Committees having this Code in charge, is to secure uniformity of legislation. The provisions, drafted and supported by my learned friend, would nullify decisions of the Supreme Court extending over a period of nearly eighty years, of the decisions of nearly twenty States and Territories, and would necessitate the repeal of statutory provisions in four States. On the other hand, a Code following the English statute would squarely override the decisions of but three States, and would run counter to clearly defined tendencies in but three others. It would seem, therefore, that a Code, which adopted the prevailing rule, would be far more likely to secure favor with the legislatures, than one which adopts the minority rule; and would have the further advantage of not causing a diversity in the law of rescission on the two sides of the Atlantic. Any such diversity, as the Supreme Court of the United States has repeatedly declared, is to be deprecated.[2]

How the Prevailing Rule Came to Prevail.

My learned friend seems to ascribe the popularity of this rule in part, at least, to the general use in this country of Benjamin on Sales. This book, he says, "doubtless tended to impress upon the student and teacher, practitioner and judge the English doctrine."

I must confess that I fail to discover traces of this potent influence. To begin with, the first clear and authoritative enunciation of the rule is found in a decision of the Supreme Court of the United States decided in 1827,[3] and the rule could be styled the United States rule quite as properly as the English rule, for Thornton *v.* Wynn preceded Street *v.*

[1] California, North and South Dakota, whose Code provision has been referred to above, and Georgia. See Code of Ga. § 3556. This declares the rule which had been recognized by the Courts in that State, as applicable to both real and personal property, from 1849.

[2] See Norrington *v.* Wright (1885) 115 U. S. 188, 206.

[3] 12 Wheaton 183.

Blay by four years. Benjamin on Sales did not appear until 1868, and the first American Edition was published in 1874. Long before either of these dates the present prevailing rule had been adopted by the following States: Georgia,[1] Illinois,[2] Kentucky,[3] New York,[4] Pennsylvania,[5] South Carolina,[6] Tennessee[7] and Vermont.[8] In 1870, the Supreme Court of Connecticut,[9] upon a careful examination of authorities, declared that "the weight of modern decisions, as well as the analogies of the law are decidedly against" the Massachusetts rule. Two years later, the Supreme Court of Minnesota accepted the prevailing rule.[10] In 1875, the Supreme Court of Texas [11] unhesitatingly accepted it, as "supported by much the greatest weight of authority" and resting "upon the soundest principle." In 1876, Indiana[12] took the same position, and the following year, the soundness of the rule was as-

[1] Clark *v.* Cleghorn (1849) 6 Ga. 220; Wright *v.* Findley (1857) 21 Ga. 59, 68.

[2] Crabtree *v.* Kile (1859) 21 Ill. 180. After title has passed, "the vendee must then rely on the contract of warranty to cover any loss resulting from defects covered by the warranty. He cannot, by any subsequent act of his, without the concurrence of the vendor, rescind the contract and revest the title to the property in the seller."

[3] Lightburn *v.* Cooper (1833) 1 Dana 273. "Both principle and preponderating authority sustain the foregoing doctrines. They were so settled by the Supreme Court of the United States, in the case of Thornton *v.* Wynn, 12 Wheat. 183, after a careful survey and analysis of the authorities."

[4] Voorhees *v.* Earl (1842) 2 Hill 288, citing and approving Street *v.* Blay and Thornton *v.* Wynn.

[5] Kase *v.* John (1840) 10 Watts 107, citing with approval Thornton *v.* Wynn.

[6] Carter v. Walker (1845) 2 Rich. L. 40, citing and approving Street *v.* Blay and Thornton *v.* Wynn.

[7] Allan *v.* Anderson (1842) 3 Humph. 581. After quoting at length from Thornton *v.* Wynn and noting that the later case of Street *v.* Blay "maintained the same distinctions," the court concluded: "These principles so established by authority, are consonant, it seems to us, to the dictates of reason and policy. We entirely approve them."

[8] West *v.* Cutting (1847) 19 Vt. 536, citing and approving Thornton *v.* Wynn.

[9] Scranton *v.* Mechanics' Trading Co. (1870) 37 Conn. 130.

[10] Knoblauch *v.* Kronschnabel (1872) 18 Minn. 300.

[11] Wright *v.* Davenport (1875) 44 Tex. 164.

[12] Marsh *v.* Low (1876) 55 Ind. 271.

sumed by the Michigan Supreme Court, [1] although that tribunal did not formally commit itself to the rule until 1901. [2]

It thus appears that this rule has won preponderating authority, not because of any factitious circumstances but because the courts of England, the Supreme Court of the Nation and the courts of many of our most important commercial States have been convinced that it rests upon sound legal principle and wise public policy.

It Accords with Sound Legal Principle.

The main purpose of a sale contract is to transfer title and possession from the seller to the buyer. When this purpose has been accomplished with the assent of both parties, and the transaction is free from fraud, and the buyer has not stipulated for the right of rescission but has contented himself with a collateral promise as to quality or as to some other fact relating to the thing sold, the only reasonable inference, as to the intention of the parties, is, that this promise is one of indemnity. It is intended to "stand as security of performance; and the injured party is to prosecute his remedy upon it to enforce, and not to avoid the contract." [3] This doctrine is not peculiar to the law of sales. The distinction between a "condition" [4] and a "warranty," which my learned friend declares to be so confusing, is fundamental in the law of contracts, and is enforced by the Courts in

[1] Kimball &c. Mnfg. Co. *v.* Vroman (1877) 35 Mich. 310.

[2] H. M. Williams Trans. Line *v.* Darius Cole Trans. Co. (1901) 129 Mich. 209. "It is demonstrable that the few States which are said to follow the Massachusetts rule, and permit rescission for a mere breach of warranty, are out of line. * * * We think that Street *v.* Blay states the logical rule. We find ourselves at liberty to follow it, and therefore hold that this complainant had not the right to rescind the contract when the attempt to do so was made."

[3] Campbell, J. in Kimball &c. Manufacturing Co. *v.* Vroman (1877) 35 Mich. 310, 325, 24 Am. R. 558.

[4] In 16 Har. Law Rev. 467 Professor Williston writes, the "name condition has been applied, not very happily, to a promise which forms in terms part of the description of the goods." Sir William Anson, in the Tenth Edition of his admirable treatise on Contracts, referring to the substitution of the term "implied condition" for "implied warranty in the Sale of Goods Act, writes: "This Act has happily superseded the use for this purpose of the term 'implied warranty,' a use long ago emphatically condemned by Lord Abinger, though it survived until 1894, to the confusion of all terminology, relating to the contract of sale." p. 319 *n.* 2.

charter-party cases,[1] in cases between employer and employed,[2] as well as those between passenger and carrier,[3] and many others.

Even were the distinction as difficult to make, as my learned friend fancies, that fact would not justify separating contracts of sale of goods from other contracts, and applying to them an anomalous doctrine. But the inherent difficulty, I cannot help thinking, has been greatly exaggerated. At the close of his second article, Professor Williston writes "it would be hard to find a better illustration of the subtle and confused character of the English law of warranty than that my learned brother and myself, whose occupation requires us to teach that law, should be apparently at variance as to what it is." But, as I have shown at the opening of this article, there is no such variance. The trouble was not with the subtle and confused character of the English law of warranty, but was due either to my inability to make my learned brother understand me, or to his inability to discover my views.

The real source of confusion has been the use of the word warranty in different senses. No better illustration of this fact can be found than that afforded by the opinion in Bryant *v.* Isburgh.[4] Judge Metcalf declared "there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter, which he has under the former,"

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[1] Behn *v.* Burness (1863) 3 B. & S. 751, 756, Pust *v.* Dowie (1863) 32 L. J. L. B. 179. Both cases follow and apply the views of Lord Wensleydale in Graves *v.* Legg (1854) 9 Exch. 709 at p. 716, which is a sales case.

[2] Bettini *v.* Gye (1876) L. R. 1 Q. B. D. 183, holding that the promise of the employee was a warranty in its narrow sense, "an independent agreement," a breach of which did not justify a repudiation of the contract by the employer, but only furnished a cause of action for a compensation in damages. In Poussard *v.* Spiers (1876) 1 Q. B. D. 410, the same court held the promise of the employee to be a condition precedent. Both cases applied the doctrine of Graves *v.* Legg (1854) 9 Exch. 709.

[3] Richards *v.* London &c. Ry. (1849) 7 C. B. 839; Le Blanche *v.* London &c. Ry. (1876) 1 C. P. D. 286. Commenting upon the contracts in these cases Sir William Anson says: "That the promises are warranties and not conditions is apparent from the fact that neither loss of luggage nor unpunctuality (of trains) would entitle the passenger to rescind the contract and recover his fare."

[4] (1859) 13 Gray (97 Mass.) 607.

and then quotes a *dictum* from Chief Justice Parker,[1] that when a seller shows a sample, upon the strength of which a contract of sale is made, "he certainly undertakes that the thing is the same generically and specifically, as that which he shows for it, and if a different thing is delivered he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." Here, Chief Justice Parker is referring to the buyer's right to reject goods tendered to him under a sale by sample, when he discovers upon delivery that they do not agree with the sample. Had he used the terminology of the present English Statute, does anyone believe that Judge Metcalf would have failed to notice the clear difference between an implied condition in an executory contract, and an express collateral warranty attendant upon an executed sale?

Whatever may be the answer to the foregoing question, there can be no doubt that the Massachusetts rule did not originate in the considerations of principle urged in its support by Professor Williston. Neither Judge Metcalf, nor any one of the judges of that Commonwealth, who had part in formulating the rule, lay stress upon "the business customs of a community," or evince a dislike of the doctrine of *caveat emptor*, or a disposition to make the law more ethical. The rule owes its origin partly to the fallacy of equivocation due to the duplicity of the term warranty, already adverted to, and partly to the failure to distinguish between a deceitful and an innocent warranty. This is quite apparent in the case of Perley *v.* Balch,[2] where there was abundant evidence of a fraudulent warranty of an ox, and the Court charged "that if, on the sale of the ox, there was fraud, or an express warranty and a breach of it, the defendant might avoid the contract by returning the ox within a reasonable time." This charge was sustained, without any intimation that the court suspected a difference existed between deceitful and innocent warranties.

[1] Bradford *v.* Manly (1816) 13 Mass. 139. In his argument for defendant, Shaw (later Chief Justice) laid it down as unquestioned law that as the buyer had accepted and kept the goods (as he had done for more than a year after their delivery) he could not "then proceed as upon a contract *to* sell, still open and unexecuted; but must have his remedy, if any, for a fraud, or upon a warranty, as upon a sale executed."

[2] (1839) 23 Pickering 283.

Defendant's counsel in Bryant *v.* Isburgh argued: "The right of rescission is admitted to exist where there is fraud, or actual knowledge of the untruth of the warranty. But an express warranty renders the knowledge of the vendor immaterial, as is shown by the old form of declaring upon a breach of warranty in an action on the case for a deceit, where, if there was an express warranty, a *scienter* need not be laid; or if alleged, need not be proved." As damages for breach of an express warranty could be recovered, whether it was deceitful or innocent, so, it was argued, should rescission be allowed in either case. In this *non-sequitur*, and in the fallacy of equivocation, the anomalous Massachusetts rule had its origin. That the Massachusetts rule was not firmly established prior to the decision in Bryant *v.* Isburgh (1859) is indicated by the following charge given to the jury in that case by Mellen, C. J.: "The defendant had no right to return the horse and rescind the contract, in the absence of fraud on the part of the plaintiff, unless such were given by the terms of the contract; but that his proper remedy was an action for damages for the breach of the warranty."

Practical Advantages of the Two Rules.

The earliest judicial statement of any practical advantage of the Massachusetts rule, that I have discovered, is contained in a dictum of Chief Justice Shaw.[1] After pointing out that "a warranty is a separate, independent, collateral stipulation on the part of the vendor, * * * not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor; and, notwithstanding any breach of it, the vendee may hold the goods, and have a remedy for his damages by action," he adds, "But to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud." Judge Metcalf said of the rule: it "prevents circuity of action and multiplicity of suits."[2] I may be dense, but I cannot see how it prevents either

[1] Dorr *v.* Fisher (1848) 1 Cush. (Mass.) 271.

[2] Bryant *v.* Isburgh (1859) 13 Gray (79 Mass.) 607, 612.

circuity or multiplicity of suits. Under the prevailing rule, if the vendee has not paid the price, he can set up the breach of warranty in diminution of the price when sued therefor. If he has paid it, he can recover damages. In case the parties cannot agree, either about the fact of a breach, or the amount of damages, a lawsuit will ensue under either rule, and only one lawsuit is necessary under either. If they can agree, no lawsuit will follow under either rule.

The practical advantages of the Massachusetts rule are described by my learned friend as "two-fold: first greater justice; second the avoidance of the necessity of determining certain very troublesome questions of fact in order to settle a buyer's rights."[1] Let us deal with these in the inverse order of their statement.

In the first place, I beg to note that sections thirty-six and fifty-four of my learned friend's proposed draft show that the Massachusetts rule does not and cannot avoid this necessity. Section thirty-six relieves the buyer from returning the goods, upon refusing "to accept them having the right so to do," while in one of the cases provided for in section fifty-four, he must return them. Here is one of the self-same troublesome questions of fact to be decided by the vendee before he can be sure of his rights.

In the second place, the reported cases indicate that quite as troublesome questions of fact arise under the Massachusetts rule as under the prevailing doctrine. This was impressed upon me, in examining the Missouri and Wisconsin cases cited by my learned friend, for what he confidently claims to be the law of those States. In seven of the cases,[2] judgments were reversed because of error on

[1] 16 Harv. L. Rev. at p. 472.

[2] Branson *v.* Turner (1883) 77 Mo. 489; Johnson *v.* Whitman Agl. Co. (1885) 20 Mo. App. 100; Kerr *v.* Emerson (1895) 64 Mo. App. 159; Minn. Threshing Co. *v.* Wolfram (1897) 96 Wis. 481; Warder *v.* Fisher (1879) 48 Wis. 338; Croninger *v.* Paige (1880) 48 Wis. 229; Boothby *v.* Scales (1871) 27 Wis. 626. The last cited case furnishes an excellent example of the confusion lurking in the equivocal term "warranty." The charge of the trial court, which was approved on appeal, is as follows: "In a case of a breach of warranty *in reference to matters which are the condition* of the purchase, he had a right to do this (offer to return the mill) within a reasonable time." This shows that the Court was not applying the Massachusetts rule, but was recognizing the right of rescission only when the broken engagement of the seller was *the condition* of the purchase. That the dictum of the appellate court on p. 636 was not the result of a careful examination of authorities is apparent from its citing Connecticut, New York and Pennsylvania as sustaining its dictum.

the part of the lower courts in dealing with the troublesome question of fact, whether the buyer had acted promptly enough or in the right way, in returning or attempting to return the property. (In the remaining four cases[1], the buyer did not attempt rescission.) In short, the Massachusetts rule substitutes for one set of troublesome questions of fact another set equally troublesome and equally conducive to litigation.

But, it is urged, the Massachusetts rule produces greater justice. From this view, I most confidently dissent. Undoubtedly, in retail sale transactions, where the merchant and customer are near each other, it is often better for both parties, that the sale be rescinded and the goods be returned. Business usage favors such conduct, even in the absence of an express notification by the merchant (which is usual) that he will take the goods back. But the great bulk of important commercial transactions are not between neighbors; they are between parties at a distance—sometimes separated by the width of the continent. Is it promotive of justice, to give, by a fixed rule of law, to such purchasers the right to throw the goods back upon the hands of the seller, *in cases*, it is to be borne in mind, *where the purchaser has deliberately taken title, without hinting at his desire for a stipulation of a right to return, but on the other hand, has taken a warranty, as his indemnity against loss?* In several of the cases, cited as supporting the Massachusetts rule, it appears that while the parties were litigating the questions as to whether the warranty had been broken, and whether the vendor was bound to take back the property, it was lost. The buyer tendered the property and would have nothing more to do with it. The seller would not receive it, nor have anything to do with it. And so it was lost. Had the parties been in a jurisdiction where the prevailing rule obtained, they would not have been tempted thus to let the property go to waste. Under that rule, and the further rule that a person is bound to act reasonably, in minimizing the damages due to a breach of obligation, the buyer would have made such use of the property, as he reasonably could, and would have recovered such damages as he could show he had suffered.

[1] St. Louis Brewing Assoc. *v.* McEnroe (1899) 80 Mo. App. 429; Edwards *v.* Noel (1901) 88 Mo. App. 434; Optenburg *v.* Skelton (1901) 109 Wis. 241; Parry Mn'fg. Co. *v.* Tobin (1900) 106 Wis. 286.

THE ETHICAL SUPERIORITY.

The last and crowning advantage claimed for the Massachusetts rule is its alleged ethical superiority. It is said: "The morality of taking advantage afterwards of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale."[1] How, I beg to ask, does the seller under the prevailing rule take any undue advantage of the buyer? *If the breach of warranty harms the buyer, does not that rule recognize and enforce his claim to full compensation in damages?* When he deliberately took title, without seeking a stipulation for rescission, but contenting himself with a collateral contract of indemnity, did he not virtually say to the seller "indemnity is all I care for, in case your innocent warranty turns out to be mistaken"? With what grace can he ask, afterwards, for rescission? I submit that the Massachusetts rule, if either, violates good faith and fair dealing here. The prevailing rule simply holds the buyer to a position which he has voluntarily elected. It does not operate harshly against him. Indeed, the prevailing rule operates not only to enforce contracts honestly and deliberately made, but, ordinarily, it benefits rather than harms the buyer. If he takes advantage of the Massachusetts doctrine, he can return the goods, but he cannot recover damages for the breach of warranty.[2] The prevailing rule, while holding him to his election to take title, allows him the right to recover all damages that the breach has caused him.

I submit, therefore, that the prevailing rule should be incorporated into the proposed Code of the Law of Sales in this country: First, because it is the prevailing rule, and came to prevail for the reasons and in the way above described; second, because, it is the rule of the English Code, and uniformity on this important topic in commercial law is most desirable; third, because it accords with the general principles of the law of contracts; fourth, it holds parties to contracts which they have honestly and deliberately made, and, fifth, because it treats both parties with perfect fairness and works no injustice to either.

FRANCIS M. BURDICK.

[1] 16 Harv. Law Rev. p. 474. [2] 16 Harv. Law Rev. 474 *n.* 1.